Filed 9/29/03 P. v. Piecuch CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KRZYSZTOF PIECUCH, Defendant and Appellant.	G030778 (Super. Ct. No. 01HF1514) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Lynelle K. Hee, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Raquel M. Gonzalez and Heather F. Wells, Deputy Attorneys General, for Plaintiff and Respondent.

Krzysztof Piecuch was convicted of four counts of second degree burglary and two counts each of grand theft and possessing a forged check with the intent to defraud. He contends there is insufficient evidence to support his convictions, the prosecutor committed misconduct in closing argument, and the court erred in ordering him to pay certain monetary penalties. Finding these contentions unmeritorious, we affirm the judgment.

* * *

On October 16, 2001, Piecuch opened an account at Union Bank by depositing a $7,500 check made payable to him by Brown Schools, an educational services company. The bank placed a hold on the check for $7,000, and Piecuch withdrew the rest. The next day, Piecuch deposited a second check from Brown Schools for $679.31. The bank placed a hold on this check, too, except for $200, which Piecuch withdrew.

Piecuch returned to the bank the following day to inquire about the holds. When informed they were still in effect, he said he would call shortly to see if the checks had cleared. Sure enough, Piecuch called later that morning and the bank told him the first check had gone through. A short time later, Piecuch arrived at the bank and withdrew $5,500. Half an hour later, he withdrew an additional $1,800 from a different branch of the bank.

As it turned out, the checks were counterfeit. They carried the account number of Brown School's accounts, but there was no logo or phone number on them. Brown Schools did not authorize any payments to Piecuch, nor has it ever had any dealings with him. The checks were actually issued to other payees in September 1999.

I

Piecuch does not dispute the checks were counterfeit. Rather, he argues there is insufficient evidence he knew they were bogus. We disagree.

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

In arguing he lacked knowledge of the counterfeit nature of the checks, Piecuch points out that he provided proper identification when depositing them, he went to the same bank branch three days in a row, and he was never described as being nervous or anxious. He submits this evidence, when taken together, is "consistent with the reasonable interpretation that [he] did not know that the check[s were] counterfeit." However, the possibility "that the evidence could reasonably be reconciled with a finding of innocence . . . does not warrant a reversal of the judgment." (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) So long as "a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt," we must affirm. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) This is true whether the case rests primarily on direct or circumstantial evidence. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

A review of the record reveals substantial evidence to support the jury's determination that Piecuch knew the checks were counterfeit. For starters, Piecuch had no affiliation with Brown Schools or any entitlement to its money. The school had issued the checks to someone other than Piecuch, and it did so over a year before Piecuch deposited them. Furthermore, the checks gave the appearance of being irregular, in that they were missing a logo and phone number. And Piecuch deposited them on different dates, which suggests he was trying to stretch out his scheme to avoid detection. Of course, as soon as the checks cleared, he all but cleaned out his account. Considering these circumstances, the jury could reasonably have found the knowledge requirement satisfied beyond a reasonable doubt.

II

Piecuch also claims his convictions for grand theft must be reversed because the bank relied on its own investigation in dispensing the funds, rather than his representations. The claim does not hold water.

With respect to the grand theft counts, Piecuch was prosecuted under the theory he obtained the check funds under false pretenses. This theory required the prosecution to prove the bank transferred the funds to Piecuch in reliance on his false representations. (See *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1842.) However, the prosecution was not required to prove these representations were the sole motivating factor behind the bank's actions. The state only had to show that Piecuch's representations materially influenced the bank to part with the money. (*Ibid.*)

This requirement was amply proven. By walking into the bank and proffering the checks, Piecuch impliedly represented that they were valid and that he was the authorized payee. (See *People v. Whight* (1995) 36 Cal.App.4th 1143, 1151.) Although the bank placed a hold on the checks and investigated them, this action did not enable it to determine whether Piecuch's representations were true. Instead, the investigation was limited to determining whether there were sufficient funds in the Brown Schools' account to cover the checks. The bank was simply carrying out its usual policy of waiting for certain checks to clear before releasing all the funds to the purported payee. Implementation of this policy did not foreclose the bank from materially relying on Piecuch's implied representation he was entitled to receive those funds. In fact, it had little to do with this issue. We therefore uphold Piecuch's convictions for grand theft, although we admire the chutzpah required to argue that the near success of a criminal enterprise constitutes a defense to its prosecution.

III

Piecuch also claims the prosecutor committed misconduct in closing argument. Again, we disagree.

In closing argument, defense counsel accused the prosecutor of inviting the jury to engage in speculation in order to win a conviction. That prompted the prosecutor to make the following comments in rebuttal: "Folks, I'm not asking you to speculate when I show you that . . . diagram with all the items of evidence on it. This is the testimony that you got. These are the facts that you have. This isn't speculation. This isn't what if, what could be, what might have been. This is evidence, hard evidence that you received during this trial. [¶] What they're asking you to do is speculate, that's what they're doing. *You don't have any evidence from that side.* All we have is this. This is the evidence. This is the facts." (*Sic*., italics added.)

Piecuch contends the prosecutor committed misconduct under *Griffin v. California* (1965) 380 U.S. 609 by commenting on his failure to testify. However, Piecuch never objected to the challenged remarks at trial. If he had, it would have been quite easy for the court to intervene and remind the jury that Piecuch had a constitutional right not to testify and that his decision to exercise that right could not be used against him. Therefore, the issue has been waived. (See *People v. Mincey* (1992) 2 Cal.4th 408, 446 [alleged *Griffin* error arguably waived due to lack of objection].)

Even if the issue had been preserved, we would reject Piecuch's claim because the prosecutor never said anything about his failure to testify. He did comment on the state of the evidence — including the defense's failure to present any — but that is not objectionable per se. (*People v. Mincey, supra,* 2 Cal.4th 3d at pp. 35-36.)
A prosecutor's argument becomes objectionable only when it focuses the jury's attention on the defendant's failure to testify. (*Griffin v. California, supra*, 380 U.S. at p. 615.)

Piecuch argues the prosecutor's remarks did just that because, even though they were couched in general terms, evidence on the issue of intent could only have come from him. But evidence of intent can be derived from a multitude of sources; it need not come directly from the defendant. (See generally *People v. Buckley* (1986) 183

Cal.App.3d 489, 494-495 [intent is often established by way of circumstantial or indirect evidence].)

For example, if, in this case, someone from the Brown Schools had testified defendant once worked for them, it might have suggested he could have thought he had a legitimate claim to money from them, thereby undermining the evidence of intent to defraud. We therefore reject Piecuch's claim that the prosecutor's remarks were necessarily aimed at his failure to testify. No *Griffin* violation has been shown. (See *People v. Johnson* (1989) 47 Cal.3d 1194, 1236 [prosecutor permissibly argued, "Obviously, if there has been some or is some defense to this case, you'd either have heard it by now or for some reason nobody's talking about it."]; *People v. Morris* (1988) 46 Cal.3d 1, 35-36 [No *Griffin* violation shown where, after asking jurors to imagine being in defendant's position, the prosecutor argued "you can bet your boots that if you had anything to offer by way of evidence, by way of alibi, that you would offer it."]; *People v. Ratliff* (1986) 41 Cal.3d 675, 690-691 [same where prosecutor argued, "Absolutely zero has been presented to you by (the defendant) and his attorney . . . ."].)

Alternatively, Piecuch contends the prosecutor's comments infringed his due process rights by impermissibly shifting the burden of proof to the defense. But the comments in question did not touch on the burden of proof whatsoever. And when the prosecutor did address this subject, he correctly stated that the People had the burden of proving guilt beyond a reasonable doubt. Defense counsel and the trial judge also reminded the jury of this fact. Under these circumstances, there was no danger of the jury misallocating the burden of proof in this case. (See *People v. Ratliff, supra,* 41 Cal.3d at p. 691.)

IV

Lastly, Piecuch challenges the court's sentencing order to the extent it requires him to pay $8,179.31 in restitution to Union Bank, as well as a $10 fine pursuant to Penal Code section 1202.5, subdivision (a). We find Piecuch has waived his right to

contest the restitution order. While he now claims he really only owes the bank $8,000, he never objected to the higher amount of $8,179.31, which was the amount recommended in the probation report. Indeed, Piecuch himself told the sentencing judge, "I would like to pay this restitution, if you just let me do it." Since Piecuch actually embraced the recommended amount of restitution, the waiver rule fully applies. (See *People v. Gonzalez* (Aug. 21, 2003, S107167) __ Cal.4th __ [objection to restitution order deemed waived by virtue of defendant's failure to raise it at sentencing].)

The $10 fine is a different matter. Unlike the restitution issue, no mention of the fine was made in the probation report, and the trial court did not really give Piecuch a meaningful opportunity to object to the fine. It simply announced the fine as part of its overall sentence, advised Piecuch of his right of appeal, and remanded him to custody. The waiver rule does not apply in this situation. (*People v. Gonzalez, supra*, __ Cal.4th at p. __.)

Nonetheless, we find the fine was properly imposed. Piecuch argues the trial court was required to make an *express* finding on his ability to pay before levying the fine. However, nothing in Penal Code section 1202.5, subdivision (a) requires such a finding.[1] Even if we assume the court's failure to make an express finding on Piecuch's ability to pay was error, it was surely harmless. "Ability to pay does not necessarily require existing employment or cash on hand." (*People v. Staley* (1992) 10 Cal.App.4th 782, 784-785.) A court may consider a defendant's future earning ability, including prison wages, in determining his or her ability to pay a fine. (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837.)

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[1] That section provides that in any case in which a defendant is convicted of a theft-related offense, "the court shall order the defendant to pay a fine of ten dollars ($10) in addition to any other penalty or fine imposed. If the court determines that the defendant has the ability to pay all or part of the fine, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability. In making a determination of whether a defendant has the ability to pay, the court shall take into account the amount of any other fine imposed upon the defendant and any amount the defendant has been ordered to pay in restitution."

Although Piecuch did not have a job or present income at the time of sentencing, he holds an AA degree and is 30 credits short of a Bachelor's degree at UCLA. And he was able to earn upwards of $60,000 per year in his past jobs. What's more, there does not appear to be any reason why he would not be able to work in prison while serving his three-year term. All things considered, he should have little difficulty coming up with funds to pay the $10 fine. Accordingly, there is no reason to disturb the court's sentencing order. (See generally *People v. Scott* (1994) 9 Cal.4th 331, 355 [trial court's failure to properly articulate sentencing choice does not require remand unless it is reasonably probable the defendant would have received a more favorable sentence in the absence of the error].)

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.